the Department's witnesses that they worked about the same amount of overtime throughout the time period in issue was inaccurate and unreliable, as evidenced by the concededly accurate time records for the employee witnesses.

Petitioners' witnesses applied well-accepted statistical and economic methodologies to analyze the percentage growth in the company between the PCX period and the ADP period by examining two different measures of growth: the change in annual sales figures and the change in the number of cartons of cigarettes sold each year.[8] They then applied these figures to estimate the average amount of overtime that each employee worked in each annualized period to provide a just and reasonable calculation of the amount of overtime compensation owed to employees. Petitioners' evidence adequately demonstrated that the Department's estimate of damages, based upon the employees' testimony, was rebutted by the factual and scientific evidence, was unreasonable and lacked the requisite foundation. *Reich v. Southern New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997).

Nonetheless, the Court of Appeals improperly ignored the statistical and economic evidence before it, including the fact that the growth in the company during the ADP period directly affected the amount of overtime each employee worked from the beginning of the ADP period to the end of the ADP period, which demonstrated that the Department's failure to adjust its damages calculation to account for the growth in the company was unreasonable.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, Petitioners respectfully request that the petition for writ of certiorari should be granted.

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[8] Petitioners tested two different demand variables as a check on the measure of the company's growth and the effect on the amount of overtime required as the company grew.

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Respectfully submitted,

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